

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 271 OF 1995

1. Tilakraj Amarnath Sarda,
Age 41 years, R/o. Cidco
Colony, Airoli, New Bombay,
2. Manju w/o Tilakraj Sarda,
Age 35 years, R/o. Cidco
Colony, Airoli, New Bombay ...Appellants.

Versus

The State of Maharashtra ...Respondent

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Shri. D.D. Kathrani i/b Shri. A.P. Mundargi
Advocate for the appellants.

Shri. A.S. Shitole, A.P.P. for Respondent.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATED: 13/14TH DECEMBER, 2004

ORAL JUDGMENT: -

1. Through this appeal the appellants i.e. original accused Nos. 1 and 2 have challenged the judgment and order dated 14.6.95 passed by the learned Additional Sessions Judge Thane in Sessions Case No. 375 of 1990. By the said judgment and order, the appellant No.1 came to be convicted for the offence under Section 376, 354 and 465 of I.P.C. For the offence under Section 376 he was sentenced

to R.I. for seven years and to pay fine of Rs.1,000/- i/d R.I. for three months. For the offence under Sections 354 and 465 of I.P.C. he was sentenced R.I. for six months on each count. Both the appellants were convicted under Sections 292(2)(a) r.w. section 34 of I.P.C. R.I. for six months and to pay fine of Rs.500/- each i/d R.I. for one month. Both the appellants were convicted under Section 506 r.w. 34 of I.P.C. and sentenced to R.I. for three months. In addition thereto the appellant No.2 was convicted under Section 376 r.w. Section 109 of I.P.C. and sentenced to R.I. for two years and to pay fine of Rs.500/- i/d R.I. for one month.

2. The prosecution case briefly stated is as under:-

. The prosecutrix P.W.1 Smita was residing alongwith her parents at Rabodi, Shivajinagar, Thane. Her house consisted of two rooms. Smita resided in one room alongwith her family members. The other room was let out to the appellant No.1 Tilakraj. Tilakraj resided in the said room alongwith his wife i.e. appellant No.2 and his three children i.e. Archana, Supriya and Atul. At the time when Tilakraj came to reside with his family in the house of Smita as tenant, Archana was

13 years of age, Supriya was 11 years of age and Atul was 8 years of age. In front of these two rooms there was a grocery shop which was being run by P.W.2 Latabai who is the mother of P.W.1 Smita. The relations between the family of Smita and accused were cordial. At the relevant time, Smita had failed in 10th Standard and she was studying privately for giving 10th Std examination again. Manju i.e. appellant No.2 i.e. wife of Tilakraj advised Smita to take tuition from Tilakraj in English and Arithmetic subjects. Accordingly, Smita started to go for tuition in the room of accused No.1. It is the case of Smita that when she went for tuition, she was shown obscene photographs by both the accused persons and she was threatened not to disclose this fact to anybody otherwise they would kidnap her and take her to Punjab and then sell her there.

. One day, when Smita went to the house of Tilakraj, at that time, only Tilakraj and his three children were present. Tilakraj told her that they would marry each other on 21.4.88. However, Smita refused. On the next day, when she went to the house of Tilakraj, at that time, Tilakraj and his wife were present. Tilakraj then embraced her in front of his wife and told Manju that she (Smita) was his wife. Thereafter, Smita rescued herself

and went to her house. Thereafter, on 20.4.88 Tilakraj called Smita, when she went to his house, Tilakraj told her that they would get married on the next day. However, Smita refused. On the next day i.e. on 21.4.88 in the morning, Tilakraj asked Smita to prepare tea for him. When she took tea to the room of Tilakraj and handed over tea to him, at that time, Tilakraj had shown Smita some articles like garlands, bangles, Mangalsutra etc. On 22.4.88 Tilakraj came to her house and called Smita and told her that he wanted to marry with her. On hearing this Smita closed the door of her house. On 23.4.88 again Smita was alone in her house, at that time Tilakraj asked her to take his clothes from his house for washing and when she went to his room, he forcibly put the plastic garland into her hands and by holding her hands forcibly made her put the said garland on his neck. Thereafter, he forcibly put another garland in her neck. Tilakraj also forcibly put Mangalsutra on her neck and inserted green glass bangles into her hands forcibly. Tilakraj further forcibly made Smita bow before him at his feet and then embraced her forcibly. When Smita told him that She would inform this to her parents, Tilakraj threatened her. Thereafter, Smita went to her room. However, before going to her room, she removed the Mangalsutra, garland, bangles etc. from her person

and kept them in the house of Tilakraj and returned home. On that night she was alone in the house. She was sleeping, when she awoke she found Tilakraj sitting close by. He handed over one Pedha to her and asked her to eat the same. Tilakraj told her that the said Pedha was given to her as they are married. Thereafter, he went away. On 28.4.88 in the morning Tilakraj came to her and told Smita to do household work in his house and asked her to read the chit on the suitcase. She entered in the house of Tilakraj, she found that one chit was kept on the suitcase and below the said chit there were some photos. In the said chit it was written that Tilakraj could not live without her etc. She also saw that there were some photographs in black and white. Some of the photographs were obscene. On 29.4.88, Tilakraj asked her to bring tea. She took the tea to his room, at that time Tilakraj made her sign on stamp paper. The said stamp paper was blank at that time. On 15.6.88, accused No.2 Manju returned back from Delhi, she used to call Smita to her house and if Smita did not come, Manju used to forcibly take Smita to her house. In the house Manju and Tilakraj used to sit by both the sides of Smita and used to show her obscene photographs and Manju used to insist upon her to act as in those photographs. Smita refused to do so. Thereupon, Manju used to threaten her.

. It is further the prosecution case that on 22.10.88, Manju called her from her house. Manju sent her own daughter to call Smita, who told her that her Mummy's hair are to be brushed, therefore, Smita went to the house of Tilakraj. Both Tilakraj and Manju made Smita sit on cot and both of them sat on both sides of Smita and they showed her obscene photographs. One carpet was spread over the ground near the cot. Manju asked Smita to lie on the ground when Smita refused Manju forcibly caught her and then made her lie on the carpet and thereafter, Tilakraj committed rape on her. On 24.12.88 Tilakraj and Manju called Smita from her house for studies. Smita was not ready to go there but Manju forcibly took her to her house. At about 11.30 p.m. or so Smita's mother came out of her house and called Smita to come in their house for sleeping. At that time, Manju told mother of Smita to let Smita stay in their room that night. At about 1.00 a.m. Tilakraj again committed rape on her. On 1.1.89 Tilakraj and Manju forcibly got four chits written from Smita i.e. Exh.17,18,19 and 20. On 26.2.1989 also Tilakraj and Manju called Smita in their house. Thereafter, Tilakraj committed rape on her.

. On 22.4.89 Tilakraj and Manju left the room of

Smita as the house of Smita was being demolished for putting up new construction. Tilakraj and his family shifted to Pathan Chawl and thereafter, Smita and her family shifted to Bhoir Chawl. However, even thereafter, Manju used to meet Smita on the way and used to tell her to come to their house. When Smita refused to go to the house of Manju at Pathan Chawl, Manju used to forcibly take Smita to their house in Pathan Chawl. On 29.5.89 in the afternoon Manju had forcibly taken Smita to her house at Pathan Chawl. At that time Tilakraj and their children were also present in the house. Both accused and their children were staying in one room in the said Pathan Chawl. Thereafter, Tilakraj had sexual intercourse with Smita in the presence of his children. On 23.7.89, as it was raining heavily and water had entered in the house of Smita, her parents asked her to stay in the house of Tilakraj and Manju, hence, Smita went to the house of Tilakraj and Manju to stay. On that night also Tilakraj had sexual intercourse with Smita. At that time, Manju as well as her children were present in the house. On 24.7.89 also, Tilakraj had sexual intercourse with Smita. So also on 28.9.89 in the afternoon in their house, Tilakraj had sexual intercourse with Smita in the presence of his wife.

. Around 5th January, 1989 Tilakraj met Smita near the bus stop and threatened her that now she would be 18 years of age and hence, they would kidnap her to Punjab. Upon this Smita returned home crying. At that time her sister Kalpana was present in the house. She asked Smita as to why she was crying. Thereupon, Smita informed her about the earlier incidents. She had also shown one diary to her sister Kalpana, in which she had noted down the incidents. Thereafter, the complaint (Exh.22) of Smita came to be recorded. Thereafter, investigation commenced. Smita was sent for medical examination. In the opinion of Doctor, Smita had been subjected to sexual intercourse. After completion of investigation, charge sheet came to be filed. In due course the case was committed to the Court of Sessions.

3. During the course of trial, charge came to be framed against both the appellants under Sections 292(2)(a) and 506 r.w. 34 of I.P.C. In addition thereto, charge was framed against the appellant No.1 Tilakraj under Sections 354, 376 and 465 of I.P.C. and the appellant No.2 Manju under Section 376 r.w. 109 of I.P.C. Both the appellants pleaded not guilty to the said charge and claimed to be tried. Their defence is that of denial and false implication. In addition thereto, it is the

defence of the appellant No.1 that the room of Bhaskar Deshmukh i.e. the father of Smita in which they were residing as a tenant, was demolished for development. Bhaskar Deshmukh was demanding an amount under agreement hence, there was enmity between himself and Bhaskar Deshmukh and due to this, false complaint is lodged against him.

4. During the course of trial, the prosecution examined nine witnesses. The star witness is P.W.1 Smita. After going through the evidence adduced by the prosecution, the learned Sessions Judge convicted the appellants as stated in para-1 above. Hence, this appeal.

5. I have heard Shri. Kathrani, the learned advocate for the appellants and Shri. Shitole, the learned A.P.P. for the State. I have also perused the entire record pertaining to the present case. After carefully considering the matter, I am of the opinion that the conviction of appellant No.1 under section 376 of I.P.C. deserves to be set aside.

6. The star witness in the present case is P.W.1 Smita. As the prosecution story in para 2 has been taken from the examination in chief of Smita, I do not find it necessary to repeat her evidence in her examination in chief as it would only overburden

the judgment. From the evidence of Smita and from the medical evidence on record, it is clear that the appellant No.1 had sexual intercourse with Smita. It has also come on record that when for the first time the appellant No.1 had sexual intercourse with Smita, at that time she was about fifteen years and nine months. Thus, she was slightly below 16 years of age at the time when the first incident of sexual intercourse took place. However, there are four chits on record which have been admittedly written by Smita. The said chits are at Exh.17,18,19 and 20. Smita had admitted that the said chits have been written by her. However, it is her case that they were got written by her forcibly at the instance of Tilakraj. However, after going through the said chits it does not appear that the said chits were written under any duress or can be got written forcibly by Tilakraj. There are various details in the letter which could not have been supplied by Tilakraj and the details were such that they could have been in the knowledge of Smita alone. The language used in the chits is also not that of Tilakraj or Manju. The language in the chits though in Marathi is very much different from the wording in Marathi, which is written on the stamp paper (Exh.23) by Tilakraj. From these four chits it is quite clear that Smita was in love with Tilakraj and she was pursuing him.

In the said chits she has expressed that Tilakraj should not speak about leaving her or about not speaking to her because if it is so she is reduced to tears. In the said chits Smita constantly states that the accused Tilakraj should not leave her. She has also stated therein that he should marry her. In the letters, she expressed that she wants to meet Tilakraj but she is unable to meet him or speak with him as much as she would want to. From these letters it is clear that Smita was in love with Tilakraj and she was actively pursuing Tilakraj. The evidence on record also shows that Tilakraj and Smita have gone through some sort of marriage ceremony. The evidence of Smita that Tilakraj forcibly put the garland into her hands and forcibly made her put the said garland on his neck and he forcibly put another garland in her neck then Tilakraj also forcibly put Mangalsutra in her neck and inserted green glass bangles into her hands forcibly etc. cannot be believed. Smita has not deposed about any threat being given by anyone in relation to this incident. While this entire sequence of events took place she did not shout for help. Such an important act would have been disclosed by her to her mother at least. According to Smita Tilakraj forcibly inserted green glass bangles in her hand. If Smita had resisted at least some of the glass bangles would have broken

but Smita does not say any such thing happened. This shows there was no resistance on the part of Smita. If such alleged act had taken place and it was being done against the will and wish of Smita she would have raised some kind of protest. The room in which Smita and her family resided and the room in which Tilakraj and his family was residing were adjoining one another. The wall between two rooms had gap of six inches between the top of the wall and the roof. Smita had admitted that there were many houses in the neighbourhood. She has further admitted that if any shout is raised in the room of Tilakraj it could be heard in the adjoining room i.e. in the house of Smita or in the grocery shop which was being conducted by her mother P.W.2 Latabai in front of the house. P.W.2 Latabai i.e. the mother of Smita has also stated that there were two rooms in their house, out of which in one room Tilakraj and his family resided. In front of these two rooms there was a grocery shop which was conducted by P.W.2 Latabai. P.W.2 Latabai has further stated that any noise in the room of Tilakraj could be heard either in her room or in the grocery shop which was being conducted by her. It means that even the slightest noise could have been heard in the room of P.W.2 Latabai or the grocery shop. So also it is to be noted that the mother of Smita was conducting grocery shop which

was just in front of these two rooms which were occupied by the family of Smita and the family of Tilakraj. Even the slightest noise made by Smita would have alerted her mother and her mother would have come to her rescue.

7. The story put forth by Smita that the appellant No.1 had intercourse with her on 6/8 occasions and on almost all the occasions either the wife of Tilakraj i.e. appellant No.2 or all the children of Tilakraj were present, seems to be a highly improbable story. In January, 1987 the elder daughter of Tilakraj Archana was 13 years old, his second daughter Supriya was 11 years old and his son Atul was 8 years old. It is stated by Smita that Tilakraj had intercourse with her on 22.10.88 which is more than one year after the accused and his family came to stay in the room of Smita in June, 1987. This means that at that time Archana was 14 years old, Supriya was 12 years old and Atul was 9 years old. It is highly improbable that in a one room tenement in which Tilakraj resided alongwith his wife Manju and their three children, Tilakraj would have intercourse with Smita in the presence of his wife and three grown up children.

8. Moreover, the room in which Smita and her family resided and the room in which Tilakraj and

his family was residing were adjoining one another. The wall between two rooms had gap of six inches between the top of the wall and the roof. Smita had admitted that there were many houses in the neighbourhood. She has further admitted that if any shout is raised in the room of Tilakraj it could be heard in the adjoining room i.e. in the house of Smita or in the grocery shop which was being conducted by her mother P.W.2 Latabai in front of the house. P.W.2 Latabai has also stated that any noise in the room of Tilakraj could be heard either in her room or in the grocery shop which was being conducted by her. It means that even the slightest noise could have been heard in the room of P.W.2 Latabai or the grocery shop. Even the slightest noise made by Smita would have alerted her mother and her mother would have come to her rescue. On none of the occasions Smita raised any cry of protest or put up any resistance, had she does so, her mother would have heard and rushed to her help. It appears that whatever happened, happened with the consent of Smita.

9. Smita has also stated that on 27.4.89 her room was to be demolished. Tilakraj and his family members left their house and went to reside elsewhere. Smita has stated that even thereafter, Manju, the wife of Tilakraj used to take her

forcibly to her house where they had shifted and in the said house Tilakraj committed rape on her on at least four occasions. The house in which Tilakraj and his family had shifted, was at a distance from the house of Smita. If Smita did not want to accompany Manju to her house, she would have resisted on the street and would not have accompanied Manju willingly. In the said house also on three out of the four occasions when Tilakraj had sexual intercourse with Smita, Smita has stated that the wife and children of Tilakraj were also present. This entire evidence of Smita appears to be improbable. From the evidence on record specifically from the chits written by Smita, it is clear that Smita was in love with Tilakraj. She was pursuing him. She was almost blackmailing Tilakraj that if he left her or did not act as per her wish she may do something. The facts on record clearly lead to the conclusion that the act of intercourse between Tilakraj and Smita had taken place by consent.

10. The case of Smita that Manju abetted the act of rape by her husband Tilakraj, also does not appear to be probable. As stated earlier the act of intercourse had taken place between Tilakraj and Smita by consent.

11. In the present case, there is an inordinate delay in lodging the F.I.R. The first incident of intercourse is alleged to have taken place on 22.10.88 and the last incident of intercourse is alleged to have taken place on 29.7.89, however, the F.I.R. in the present case has been lodged on 18.1.1990 i.e. almost three months after the last intercourse had taken place. Delay by itself is not fatal to the prosecution case, however the delay should be satisfactorily explained. However, in the present case no plausible explanation has come forward for the delay in lodging the F.I.R. This aspect of delay also raises considerable doubt in relation to the prosecution case.

12. As observed earlier, the act between Tilakraj and Smita has taken place due to consent. The case of Smita that threats were given to her by any of the appellants due to which she kept quiet and agreed to engage in sexual intercourse cannot be believed. However, the facts remains that Smita was slightly below 16 years old at the time of incident. In such case it is a case of statutory rape. Smita being below the age of 16 years, the offence under Section 376 of I.P.C. stands proved against the appellant No.1 Tilakraj. I have already observed earlier that the case of the prosecution that the appellant No.2 Manju abetted

the act of rape by her husband Tilakraj cannot be believed.

13. It is also the prosecution case that some obscene photographs were shown by the accused to Smita. These obscene photographs were also found in the house of Tilakraj. Nothing has been elicited in the evidence of panch witness P.W.5 R.C. Sav on the aspect of finding of obscene photographs in the house of Tilakraj so as to disbelieve him. In such case Tilakraj was rightly convicted under Section 292(2)(a) of I.P.C. However, the prosecution case that the appellant No.2 Manju also showed obscene photographs to Smita is not found to be reliable. From the chits and other evidence on record, it is clear that Smita was pursuing Tilakraj. Smita was in love with Tilakraj and she wanted to get married with Tilakraj. All this could not happened with the consent of Manju. There was no reason for Manju to show any obscene photographs to Smita.

14. The affair between Tilakraj and Smita appears to be a clandestine affair and none of the family members of Smita as well as Tilakraj knew about it. In such case there is no question of Manju giving any threats to Smita. So also there is no question of Tilakraj giving any threats to Smita. It cannot

be said that the prosecution has proved the offence of giving threats to Smita on the basis of reliable evidence.

15. I have already observed above that the four chits have been written by Smita herself and her case that the chits were got written forcibly by the appellants from her cannot be believed. Both the appellants have been convicted under Section 465 of I.P.C. for forgery of Exh.23 which is the stamp paper which is signed by Smita as well as Tilakraj. The said stamp paper (Exh.23) records that the marriage of Smita had taken place willingly with Tilakraj. I have already observed earlier that Manju had nothing to do with the acts between Tilakraj and Smita. Normally no wife would forcibly get executed a stamp paper by force in which it is written that her husband has got married to some other woman. Thus, I am of the opinion that Manju had nothing to do with the stamp paper (Exh.23). As far as Tilakraj is concerned it cannot be said that he got the said stamp paper forged to deceive Smita. As stated earlier Smita was in love with Tilakraj and she was insisting that Tilakraj should marry her. In such circumstances she would have willingly executed the said document. No doubt the document has been written by Tilakraj but the signature of both

Tilakraj and Smita appear on the document. From the evidence on record it is clear that Smita was in love with Tilakraj and as such she has willingly signed the said document. In such case, it cannot be said that Tilakraj is guilty of the offence under Section 465 r.w. 34 of I.P.C.

16. The prosecution has not succeeded in proving any of the charges against the appellant No.2 Manju. So also there is no reliable material that any separate offence had taken place under Section 354 of I.P.C.

17. After carefully considering all the facts, I am of the opinion that the prosecution has succeeded in proving the offence under Section 376 and section 292(2)(a) of I.P.C. against the appellant No.1 Tilakraj, hence I am inclined to confirm the conviction of appellant No.1 Tilakraj under section 376 and 292(2)(a) of I.P.C.

18. At this stage, the learned advocate for the appellants has submitted that the incident had occurred about more than 15 years ago. The incident had occurred as it was Smita who was in love with Tilakraj and she was relentlessly pursuing him. Smita was not of tender age. Smita was educated upto 10th Std. and she was having the

capacity to know full import as to what she was doing. Smita was capable of understanding what is good and what is bad even then she pursued Tilakraj who was a married man with three children and she wrote number of love letters to him. He has further submitted that it cannot be said that Tilakraj insisted or forced Smita to engage in any of the acts. He has further submitted that the evidence on record shows that the act of sexual intercourse had taken place by consent of Smita and not only that but Smita had instigated the appellant Tilakraj to reciprocate her feelings. Shri. Kathrani, the learned advocate for the appellants has further submitted that Tilakraj is the only earning member in the family and his two daughters are now of marriageable age. In such circumstances, he has prayed that the sentence of imprisonment may be reduced to the period undergone. I find considerable merit in the submission made by the learned advocate for the appellants. In such circumstance, I am inclined to reduce the sentence of imprisonment from seven years to the period undergone by the appellant. However, sentence in respect of fine amount as imposed by the learned Sessions Judge is maintained.

19. In the result, the conviction of the appellant

No.2 Manju on all counts is set aside. The fine amount if any deposited by her be refunded to her. The appellant No.2 is on bail. Her bail bonds shall stand cancelled. The conviction of the appellant No.1 Tilakraj for the offence under sections 354, 506 and 465 of I.P.C. is set aside. However, the conviction of the appellant No.1 Tilakraj under Section 376 and 292(2)(a) of I.P.C. is confirmed. The sentence on both counts is reduced to the period undergone by the appellant No.1. Fine amount as imposed by the learned Sessions Judge is maintained. The Appellant No.1 is on bail. His bail bonds shall stand cancelled after the fine amount is paid.

20. Criminal appeal is partly allowed.